

May 08, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PAULA WHITE,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No.2:17-CV-00287-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 16, 17. Attorney Christopher H. Dellert represents Paula White (Plaintiff); Special Assistant United States Attorney Franco L. Becia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff filed an application for Supplemental Security Income (SSI) on

1 April 26, 2013, Tr. 84, alleging disability since February 1, 2012, Tr. 201, due to  
2 bipolar disorder, manic depression, post-traumatic stress disorder (PTSD), and  
3 anxiety, Tr. 253.<sup>1</sup> The application was denied initially and upon reconsideration.  
4 Tr. 106-10, 112-17. Administrative Law Judge (ALJ) Donna L. Walker held a  
5 hearing on May 11, 2016 and heard testimony from Plaintiff, medical expert, John  
6 R. Morse, M.D., psychological expert, Margaret R. Moore, Ph.D., and vocational  
7 expert, Polly A. Peterson. Tr. 42-73. The ALJ issued an unfavorable decision on  
8 May 31, 2016. Tr. 25-35. The Appeals Council denied review on June 13, 2017.  
9 Tr. 1-6. The ALJ's May 31, 2016 decision became the final decision of the  
10 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
11 405(g). Plaintiff filed this action for judicial review on August 17, 2017. ECF  
12 Nos. 1, 4.

### 13 **STATEMENT OF FACTS**

14 The facts of the case are set forth in the administrative hearing transcript, the  
15 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
16 here.

17 Plaintiff was 47 years old at the date of application. Tr. 201. Her highest  
18 level of education was one year of college completed in 1993. Tr. 254. Her  
19 reported work history includes the jobs of flagger, healthcare worker, line worker,  
20 sander, temp worker, and bell ringer. Tr. 254, 265. Plaintiff was working at the  
21 time of her application, but reported making changes in her work activity due to  
22 \_\_\_\_\_

23 <sup>1</sup>The record also contains an application for Disability Insurance Benefits  
24 (DIB). Tr. 199-200. The record does not contain a determination on this  
25 application. However, the ALJ's decision clearly addresses only the SSI claim.  
26 Therefore, this Court only has jurisdiction over the SSI claim. If there is a pending  
27 DIB claim that has not been adjudicated, that will be addressed by the ALJ upon  
28 remand.

1 her conditions on February 1, 2012. Tr. 253.

## 2 **STANDARD OF REVIEW**

3 The ALJ is responsible for determining credibility, resolving conflicts in  
4 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
5 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
6 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
7 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
8 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
9 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
10 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
11 another way, substantial evidence is such relevant evidence as a reasonable mind  
12 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
13 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
14 interpretation, the court may not substitute its judgment for that of the ALJ.  
15 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
16 findings, or if conflicting evidence supports a finding of either disability or non-  
17 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
18 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial  
19 evidence will be set aside if the proper legal standards were not applied in  
20 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
21 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

## 22 **SEQUENTIAL EVALUATION PROCESS**

23 The Commissioner has established a five-step sequential evaluation process  
24 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*  
25 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of  
26 proof rests upon the claimant to establish a prima facie case of entitlement to  
27 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the  
28 claimant establishes that physical or mental impairments prevent her from

engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant cannot do her past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work, and (2) specific jobs which the claimant can perform exist in the national economy. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the national economy, a finding of “disabled” is made. 20 C.F.R. § 416.920(a)(4)(v).

### ADMINISTRATIVE DECISION

On May 31, 2016, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had engaged in substantial gainful activity for the months of January, February, and March of 2014. Tr. 27. However, the ALJ also found that there had been a continuous twelve month period during which Plaintiff had not engaged in substantial gainful activity, and she continued her five-step sequential evaluation. *Id.*

At step two, the ALJ determined Plaintiff had the following severe impairments: mood disorder, not otherwise specified; PTSD; personality disorder with cluster B traits; and obesity. Tr. 27.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 28.

At step four, the ALJ assessed Plaintiff’s residual function capacity and determined she could perform a range of light work with the following limitations:

the ability to lift and/or carry up to 20 pounds occasionally (1/3 of the workday); 10 pounds frequently (2/3 of the workday); sit up to 6 hours; stand and/or walk up to 6 hours; unlimited ability to reach in all directions, including overhead; unlimited manipulative abilities; unlimited postural abilities, but should never climb ladders, ropes or

scaffolds; unlimited environmental abilities, but should avoid hazardous machinery and heights.

Regarding understanding and memory, the claimant has the ability to remember locations and work-like procedures; understand and remember short and simple instructions. Regarding concentration and persistence, has the ability to carry out short and simple instructions; maintain attention and concentration for periods required between legally required breaks; perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; sustain an ordinary routine without special supervision; make simple work related decisions; complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods.

Regarding social interaction, she has the ability to ask simple questions or request assistance; perform duties in the workplace without exhibiting behavioral extremes; maintain socially appropriate behavior and adhere to basic standards of neatness and cleanliness; would perform best with superficial contact with the general public; and would work best in proximity to but not close cooperation with supervisors and co-workers.

Regarding adaptation, the claimant has the ability to be aware of normal hazards and take appropriate precautions; travel in unfamiliar places or use public transportation; set realistic goals or make plans independently of others; and would work best in a work setting where goals are clearly established and the routine is predictable.

Tr. 29-30. The ALJ identified Plaintiff's past relevant work as a newspaper collator and concluded that Plaintiff was able to perform this past relevant work.

Tr. 34.

As an alternative to finding Plaintiff ineligible at step four, the ALJ made a step five determination that, considering Plaintiff's age, education, work experience and residual functional capacity, and based on the testimony of the vocational expert, there were other jobs that exist in significant numbers in the

1 national economy Plaintiff could perform, including the jobs of silver wrapper,  
2 photocopy machine operator, and toy assembler. Tr. 34-35. The ALJ concluded  
3 Plaintiff was not under a disability within the meaning of the Social Security Act at  
4 any time from April 26, 2013, through the date of the ALJ's decision. Tr. 35.

## 5 ISSUES

6 The question presented is whether substantial evidence supports the ALJ's  
7 decision denying benefits and, if so, whether that decision is based on proper legal  
8 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the  
9 medical source opinions and (2) failing to properly address Plaintiff's symptom  
10 statements.

## 11 DISCUSSION

### 12 1. Medical Opinions

13 Plaintiff argues the ALJ failed to properly consider and weigh the medical  
14 opinions expressed by Kayleen Islam-Zwart, Ph.D., Margaret Moore, Ph.D.,  
15 Marianne Tur-Navarro, NP-C, and Diana Carlin, MSW. ECF No. 16 at 3-13.

16 In weighing medical source opinions, the ALJ should distinguish between  
17 three different types of physicians: (1) treating physicians, who actually treat the  
18 claimant; (2) examining physicians, who examine but do not treat the claimant;  
19 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
20 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more  
21 weight to the opinion of a treating physician than to the opinion of an examining  
22 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ  
23 should give more weight to the opinion of an examining physician than to the  
24 opinion of a nonexamining physician. *Id.*

25 When a treating physician's opinion is not contradicted by another  
26 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.  
27 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating  
28 physician's opinion is contradicted by another physician, the ALJ is only required

1 to provide “specific and legitimate reasons” for rejecting the opinion. *Murray v.*  
2 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining  
3 physician’s opinion is not contradicted by another physician, the ALJ may reject  
4 the opinion only for “clear and convincing” reasons, and when an examining  
5 physician’s opinion is contradicted by another physician, the ALJ is only required  
6 to provide “specific and legitimate reasons” to reject the opinion. *Lester*, 81 F.3d  
7 at 830-31.

8 The specific and legitimate standard can be met by the ALJ setting out a  
9 detailed and thorough summary of the facts and conflicting clinical evidence,  
10 stating her interpretation thereof, and making findings. *Magallanes v. Bowen*, 881  
11 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her  
12 conclusions, she “must set forth [her] interpretations and explain why they, rather  
13 than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.  
14 1988).

15 **A. Kayleen Islam-Zwart, Ph.D.**

16 On February 23, 2016, Dr. Islam-Zwart completed an evaluation for the  
17 Washington Department of Social and Health Services (DSHS). Tr. 614-21.  
18 Following the evaluation, Dr. Islam-Zwart completed a Psychological/Psychiatric  
19 Evaluation form in which she opined that Plaintiff had a marked<sup>2</sup> limitation in the  
20 ability to perform activities within a schedule, maintain regular attendance, and be  
21 punctual within customary tolerances without special supervision, to adapt to  
22 changes in a routine work setting, to communicate and perform effectively in a  
23 work setting, to maintain appropriate behavior in a work setting, and to complete a  
24 normal work day and work week without interruptions from psychologically based  
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26  
27 <sup>2</sup>A marked limitation is defined as “significant limits on the ability to  
28 perform one or more basic work activity.” Tr. 615.

1 symptoms. Tr. 616. Additionally, she opined that Plaintiff had a moderate<sup>3</sup>  
2 limitation in the abilities to understand, remember, and persist in tasks by  
3 following very short and simple instructions, to learn new tasks, to make simple  
4 work-related decisions, to ask simple questions or request assistance, and to set  
5 realistic goals and plan independently. *Id.* The ALJ found the opinion “not  
6 persuasive” and credited the opinion of Dr. Moore over that of Dr. Islam-Zwart:

7       Although Dr. Moore, the medical expert at hearing, did not have the  
8 opportunity to review [Dr. Islam-Zwart’s opinion], the findings in that  
9 report do not impact the outcome here. The information set forth in  
10 the report is essentially the same information contained in the historical  
11 record that Dr. Moore relied on to form her opinions. In addition, the  
12 evaluation was done for the receipt of benefits from the State of  
13 Washington, DSHS. Although the report was reviewed and considered  
14 by the undersigned, it is not persuasive that the claimant is incapable  
of performance of work by federal standards.

15 Tr. 33.

16       The parties disagree as to whether the clear and convincing or the specific  
17 and legitimate standard applies to the treatment of Dr. Islam-Zwart’s opinion. ECF  
18 Nos. 16 at 6, 17 at 12. The distinction in this case is immaterial as the ALJ’s  
19 reasons are either not supported by substantial evidence or fail to meet even the  
20 lessor standard of specific and legitimate.

21       The ALJ’s first reason, that Dr. Moore and Dr. Islam-Zwart relied on  
22 “essentially the same information” to form their opinions, is not supported by  
23 substantial evidence. Dr. Moore testified at the hearing that she had reviewed the  
24 file through exhibit 12F, had not discussed the case with anyone, and had never  
25 evaluated Plaintiff. Tr. 54. In contrast, Dr. Islam-Zwart evaluated Plaintiff and  
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27       <sup>3</sup>A moderate limitation is defined as “significant limits on the ability to  
28 perform one or more basic work activity.”



1 conducted a Mini-Mental Status Exam, the Trail Making Test, and the Fifteen Item  
2 Memory Test. Tr. 618-21. Considering the Ninth Circuit has clearly established a  
3 preference for opinions of examining psychologists over opinions from  
4 nonexamining psychologists, *Lester*, 81 F.3d at 830, the ALJ's finding that the two  
5 opinions were based on a review of "essentially the same information" is  
6 unsupportable. An evaluation and psychological testing is not equivalent to a  
7 review of the record. *See* 20 C.F.R. § 416.927(b)(1) ("Generally, we give more  
8 weight to the medical opinion of a source who has examined you than to the  
9 medical opinion of a medical source who has not examined you.").

10 The ALJ's second reason, that the evaluation was conducted for the receipt  
11 of DSHS benefits, is not a specific and legitimate reason. The regulations require  
12 every medical opinion to be evaluated, regardless of its source. 20 C.F.R. §  
13 416.927(c). Furthermore, the purpose for which medical reports are prepared does  
14 not provide a legitimate basis for rejecting them. *Lester*, 81 F.3d at 832. Dr.  
15 Islam-Zwart's opinion was prepared for the purpose of evaluating eligibility for  
16 DSHS benefits, and the regulations regarding eligibility differ between DSHS and  
17 the Social Security Administration. While the ALJ is not required to adopt the  
18 ultimate determination of disability or nondisability reached by DSHS, she must  
19 consider the underlying medical evidence, including medical opinions, that are the  
20 basis for such a determination. *See* 20 C.F.R. § 416.904 (2016) ("a determination  
21 made by another agency that you are disabled or blind is not binding on us.");  
22 S.S.R. 96-5p ("our rules provide that adjudicators must always carefully consider  
23 medical source opinions about any issue.").<sup>4</sup> Thus, this reason for rejecting Dr.

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25 <sup>4</sup>On March 27, 2017, S.S.R. 96-5p was rescinded and 20 C.F.R. § 416.904  
26 was amended to include "we will consider all of the supporting evidence  
27 underlying the other governmental agency or nongovernmental entity's decision  
28 that we receive as evidence in your claim."

1 Islam-Zwart's opinions fails to meet the specific and legitimate standard.

2 Defendant alleges that the ALJ was not required to consider Dr. Islam-  
3 Zwart's opinion because it was regarding an issue reserved for the Commissioner.  
4 ECF No. 17 at 13. This was not a reason provided by the ALJ in her explanation  
5 for finding the opinion "not persuasive." *See* Tr. 33. As such, Defendant's  
6 assertion is a *post hoc* rationalization, which will not be considered by this Court.  
7 *See Orn*, 495 F.3d at 630 (The Court will "review only the reasons provided by the  
8 ALJ in the disability determination and may not affirm the ALJ on a ground upon  
9 which he did not rely.").

10 Considering the ALJ failed to properly address the Dr. Islam-Zwart's  
11 opinion, the case is remanded to the ALJ for additional proceedings.

12 **B. Margaret Moore, Ph.D.**

13 Dr. Moore testified at Plaintiff's hearing opining that Plaintiff did not meet a  
14 listing at step three. Tr. 56-60. She did not provide a mental residual functional  
15 capacity determination. Additionally, she did not review the evaluation or opinion  
16 from Dr. Islam-Zwart or the evaluation from Cynthia Jones, ARNP. Tr. 54 (stating  
17 she had only reviewed through exhibit 12F and the above reference records were in  
18 exhibit 13F). In light of the remand for the ALJ to further address the opinion of  
19 Dr. Islam-Zwart, she will also address the opinion of Dr. Moore on remand.

20 **C. Marianne Tur-Navarro, NP-C, and Diana Carlin, MSW**

21 Plaintiff additionally challenges the ALJ's rejection of the opinions of Nurse  
22 Tur-Navarro and Ms. Carlin. ECF No. 16 at 10-13.

23 Opinions from nurse practitioners and therapists are not considered medical  
24 opinions because they are not considered "acceptable medical sources." 20 C.F.R.  
25 §§ 416.902(a); 416.927(a)(1). However, the ALJ is required to consider these  
26 opinions, 20 C.F.R. § 416.927(f)(1), and the ALJ can only reject these opinions by  
27 providing reasons germane to each witness for doing so. *Ghanim v. Colvin*, 763  
28 F.3d 1154, 1161 (9th Cir. 2014).

1 This case is being remanded for the ALJ to properly address the opinions of  
2 acceptable medical sources. Therefore, upon remand the ALJ will also readdress  
3 the opinions of these non-acceptable medical sources.

## 4 **2. Plaintiff's Symptom Statements**

5 Plaintiff contests the ALJ's determination that her symptoms statements  
6 were not entirely consistent with the medical evidence and other evidence in the  
7 record. ECF No. 16 at 13-17.

8 The evaluation of a claimant's symptom statements and their resulting  
9 limitations relies, in part, on the assessment of the medical evidence. *See* 20  
10 C.F.R. § 416.929(c); S.S.R. 16-3p. Therefore, in light of the case being remanded  
11 for the ALJ to address the medical source opinions in the file, a new assessment of  
12 Plaintiff's subjective symptom statements is necessary.

## 13 **REMEDY**

14 The decision whether to remand for further proceedings or reverse and  
15 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
16 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
17 where "no useful purpose would be served by further administrative proceedings,  
18 or where the record has been thoroughly developed," *Varney v. Secretary of Health*  
19 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
20 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280  
21 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)  
22 (noting that a district court may abuse its discretion not to remand for benefits  
23 when all of these conditions are met). This policy is based on the "need to  
24 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are  
25 outstanding issues that must be resolved before a determination can be made, and it  
26 is not clear from the record that the ALJ would be required to find a claimant  
27 disabled if all the evidence were properly evaluated, remand is appropriate. *See*  
28

1 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211  
2 F.3d 1172, 1179-80 (9th Cir. 2000).

3 In this case, it is not clear from the record that the ALJ would be required to  
4 find Plaintiff disabled if all the evidence were properly evaluated. Further  
5 proceedings are necessary for the ALJ properly address the medical source  
6 opinions in the record and Plaintiff's symptom statements. Additionally, the ALJ  
7 will supplement the record with any outstanding medical evidence and call a new  
8 psychological expert to testify at remand proceedings and elicited testimony as to  
9 whether or not Plaintiff meets or equals a listing. If the expert testifies that  
10 Plaintiff does not meet or equal a listing, the ALJ will take testimony regarding  
11 Plaintiff's mental residual functional capacity.

## 12 CONCLUSION

13 Accordingly, **IT IS ORDERED:**

14 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
15 **DENIED**.

16 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is  
17 **GRANTED** and the matter is **REMANDED** to the Commissioner for additional  
18 proceedings consistent with this Order.

19 3. Application for attorney fees may be filed by separate motion.

20 The District Court Executive is directed to file this Order and provide a copy  
21 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**  
22 **and the file shall be CLOSED.**

23 DATED May 8, 2018.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

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24 JOHN T. RODGERS  
25 UNITED STATES MAGISTRATE JUDGE  
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